INDEX

Page

I. Nature of the Case 1

II. Petitioner's contentions as to why he should have the free use of Respondent's music 3

III. Short answer to the contention that purchase of the sheet music carries with it the right of public performance for profit—and the further contention that this question has never been passed upon by this Court 4

IV. Short answer to the contention that the question of the validity of the Nebraska statute can and should be reviewed by this Court in the present state of the record 7

V. Short answer to "unclean hands" contention 10

VI. Analysis of the five "reasons" advanced for certiorari 12

(a) Claim that Federal Courts have never had the true text of Sec. 1(e) before them 12

1. Hubbell case 12

2. Witmark case 12

(b) Claim that there is a conflict between the Circuits 17

(c) Claim that the question as to whether sale in sheet music form frees public performance rights has never been before this Court 18

(d) The play on "All rights reserved, including public performance for profit" 23

(e) Effort to have Court review whether Respondents engaged in business in Nebraska 25

(f) Attempt to inject monopoly issue into the case 26

(g) Effort to convince Court that copyrights are issued for "protection" of music users 28

VII. Misstatements relied upon to capture the interest of the Court 30

CASES AND STATUTES

Pages

Berlin, Irving, Inc. v. Russo, et al. (5th C. C. A.), 31 Fed. (2) 832..... 24

Bobbs-Merrill Publishing Co. v. Straus, 210 U. S. 339 24

Buck v. Jewell-LaSalle Realty Co., 283 U. S. 191, 75 L. Ed. 971....4, 10, 14, 24

Church Co., John v. Hilliard Hotel Co., 242 U. S. 591, 61 L. Ed. 511....4, 16, 18

Famous Music Corporation v. Melz (D. C. Western Dist. La. 1939), 28 F. Supp. 767 24

Fox Film Corporation v. Royal, 286 U. S. 123, 127 33

Grant v. Raymond, 6 Pet. 218, 8 L. Ed. 376 .....22, 23

Herbert v. Shanley, 242 U. S. 591, 61 L. Ed. 511 .....4, 10, 13, 16, 19

Hubbell v. Royal Pastime Amusement Co., 242 Fed. 1002.....13, 14

Marsh v. Buck, 313 U. S. 406 .....10, 32

Straus v. Victor Talking Machine Co., 243 U. S. 490 24

Watson v. Buck, 313 U. S. 406 .....10, 32

Witmark & Sons v. Pastime Amusement Co. 298 Fed. 470 .....13, 14, 33

Witmark v. Standard, 221 Fed. 376 22

17 U. S. C. A., Sections 1, 5, 18, and 25 ..... 2, 33

59-1303, et seq. Revised Statutes Nebraska 1943 3

59-1304, Revised Statutes Nebraska 1943 9

Shepherd's Federal Reporter Citations, column one, page 1297 14

Statutes at Large and Treaties of the United States of America, Vol. II Boston 1859, pp. 138-139 .....21, 33

Copyright Act, 1897, Sec. 4966 21

Copyright Act, 1909, Sec. 1 and 1(e) 12, 14, 16, 19, 20, 30

Supreme Court of the United States

OCTOBER TERM, 1946

No. 764

INTERSTATE HOTEL COMPANY OF NEBRASKA,
Petitioner,

v.

REMICK MUSIC CORPORATION,
Respondent.

No. 765

PEONY PARK,
Petitioner,

v.

M. WITMARK & SONS,
Respondent.

No. 766

LLOYD G. FOX,
Petitioner,

v.

CHAPPELL & CO., INC.,
Respondent.

No. 767

INTERSTATE HOTEL COMPANY OF NEBRASKA,
Petitioner,

v.

JEROME KERN AND T. B. HARMS COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Nature of the Case

We may speak of the four cases here involved as one case since the issues are the same in all cases.

The Respondent is the owner of a copyrighted piece of music. It brought this action to restrain the defend-

ant from playing that music commercially without license or permit. In other words, the copyright owner here is seeking to protect the right of public performance for profit granted him by the United States Copyright Act of March 4, 1909, 35 Stat. L. 1075, 17 U. S. C. A. Sections 1, 5, 18 and 25.

The appellant seeks certiorari upon a very novel and startling theory. His real defense here and his main point upon which he seeks this writ is that the copyright proprietor of a musical composition, having sold and published his work, thereby loses his right of public performance for profit.

The appellant urged this as a defense in the District Court in an action for infringement of the right of public performance for profit and he urged it in the Circuit Court of Appeals. However, when he came to prepare his petition and writ here his courage apparently failed him. Instead of presenting the issues squarely and openly, he embarked upon a course of circumlocution, advancing five so-called "reasons" which skirted this main proposition and which if supported would lead to the ultimate result of depriving the copyright proprietor of his performing rights.

We urged that these performing rights are given to the copyright proprietor by the Copyright Act of 1909 as a vested and integral part of this copyright; that they cannot be taken away from him; that the sale and publication of the sheet music does not affect that performing right; and that indeed the exploitation of any of the rights given to the proprietor of a musical

composition does not affect the subsequent exploitation of any of the other rights reserved.

Petitioner's contentions as to why he should have free use of respondent's music

The Petitioner admits that he performed the Respondent's music commercially, that is, publicly for profit, in his hotel dining room (or dance hall or roller skating rink), and that he paid Respondent nothing for the privilege and had neither license nor permit to use the music commercially, but Petitioner contends that he was entitled to the free use of Respondent's music—

1. because (Petitioner asserts) by publication and sale of the composition in the form of sheet music the Respondent automatically conferred upon the purchaser the right to perform the composition publicly for profit; and

2. because the Respondent did not comply with a Nebraska Statute then in effect, Section 59-1303 et seq., Revised Statutes Nebraska 1943, which required a copyright owner, as a condition precedent to collecting anything for the commercial use of his music in Nebraska, to specify upon the musical composition, in whatever form it might be published or printed, the selling price thereof for public rendition for profit, and granted to any purchaser the right, upon the payment of such fee, to use the music commercially as many different times as he pleased, and in as many different ways as he pleased, including rendition by individuals, bands, orchestras, radio broadcasting stations, electrical tran-

scriptions and musical records. (This Act also required the copyright owner as a condition precedent to the selling or disposition of the composition in Nebraska to file with the Secretary of State a copy of the composition and pay a fee of 25c for each filing;) and

3. because the plaintiff had retained its membership in the American Society of Composers, and Publishers (outside of Nebraska), and therefore, since ASCAP had been barred from Nebraska as a price fixing combination of copyright owners, Respondent was so besmirched by membership therein as to be present in a court of equity with unclean hands.

Short answer to the first contention

As to the first point the Supreme Court of the United States has already said in four cases that the owner of a copyright has the right to publish and sell copies of the musical work, and the right publicly to perform the work for profit, and that the copyright owner may exercise either right or both as his interests may dictate. *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191, 75 L. Ed. 971, and *Jewell-LaSalle Realty Co., v. Buck*, 283 U. S. 202, 75 L. Ed. 978, *Herbert v. Shanley*, 242 U. S. 591, 61 L. Ed. 511, *John Church Co. v. Hilliard Hotel Co.*, 242 U. S. 591, 61 L. Ed. 511, and the federal courts for years have enforced the right of public performance for profit in favor of the copyright owner, notwithstanding publication of the composition in sheet music form. A few of the cases are—

Dance Halls

Irving Berlin, Inc. v. Daigle (C. C. A. 5, 1929, 31 F. (2) 832).	"You Forgot to Remember" "Yes, Sir, That's My Baby" "What Do I Care, What Do I Care, My Sweetie Turned Me Down"
Buck v. Milam, 32 F. (2) 622.	"Ramona" "The Sunrise"
Buck v. Crescent Gardens Operating Co., 28 F. Supp. 576.	"Christopher Columbus" "My Blue Heaven"
Dreamland Ball Room v. Shapiro, Bernstein & Co., 36 F. (2) 354 (C. C. A. 7, 1929).	"Mississippi Mud" "My Ohio Home" "Dream Kisses"
Buck v. Pettijohn, 34 F. Supp. 968.	"You Must Have Been A Beautiful Baby"
Buck v. Spanish Gables, 26 F. Supp. 36.	"Boo Hoo"
Buck v. Dacier, 26 Supp. 37.	"Sweet Sue" "It's A Sin To Tell A Lie"
Buck v. Russo, 25 F. Supp. 317.	"You're Laughing At Me" "Pennies From Heaven"

Moving Picture Theatres

Irving Berlin, Inc. v. Daigle (C. C. A. 5, 1929), 31 F. (2) 832).	"You Forgot to Remember" "Yes, Sir, She's My Baby"

Harms v. Cohen, 279 F. 276.	"Tulip Time"
Famous Music Corporation v. Melz, 28 F. Supp. 767.	"I'd Climb The Highest Mountain (If I knew I'd Find You)" "Deep Night" "Just One More Chance"
M. Witmark & Sons v. Calloway, 22 F. (2d) 412.	"Smilin' Through"
Buck v. Newsreel Inc., 25 F. Supp. 787.	"Moon At Sea" "Sweet Sue—Just You" "Happy Days Are Here Again" "Roses in December"
M. Witmark & Sons v. Pastime Amusement Co., 298 F. 470, Aff'd, 2 F. (2) 1220 (C. C. A. 4, 1924).	"Kiss Me Again"

Radio

Jerome H. Remick & Co. v. American Automobile Accessories Co. (C. C. A. 6, 1925), 5 F. (2) 411 cert. denied 296 U. S. 556, 70 L. Ed. 409, 1925.	"Dreamy Melody"
M. Witmark & Sons v. L. Bamberger & Co., 291 Fed. 776.	"Mother Machree"
Jerome H. Remick & Co. v. General Electric Co., 4 F. (2) 160, Knox, J., On motion to dismiss final determination 16 F. (2) 829 (1926), Thatcher, J.	"Somebody's Wrong"

Society of Europeam S. A. A. C. v. New York Hotel Statler Co., 19 F. Supp. 1.	"As We Part"
Lutz v. Buck (C. C. A. 5, 1930), 40 F. (2) 501, cert. denied, 282 U. S. 880, 76 L. Ed. 776 (1930).	Opinion just says "Popular Music"

Tavern

Leo Feist v. Young (C. C. A. 7, 1943), 138 F. (2) 972.	"The Waltz You Saved For Me"

Short Answer to the Second Contention

As to the second proposition, it is sufficient to say that it is undisputed in the record that none of the copyright owners here involved were engaged in business in Nebraska at any time relevant to this controversy. Music was sold over the counter by locally owned music stores in Omaha. These music dealers purchased the music from Respondent or its agent in New York through the channels of interstate commerce. Nothing about such transactions brought the public performance rights to the musical composition into Nebraska. The trial court, in his opinion, carefully considered this point (see Record, pp. 27 and 28). The Circuit Court's opinion draws attention to the same point and concludes:

> "* * * none of the Nebraska music dealers by the purchases mentioned acquired the appellees' exclusive rights to publicly perform the music for profit * * *." (Record, p. 327.)

Obviously, what the music dealer did not have, he could not sell and, therefore, no purchaser in Nebraska acquired any public performance rights.

Petitioner is forced then to contend that the failure of the copyright owner to come into Nebraska and submit himself to the regulations of the Nebraska statute above referred to gave Petitioner the right to publicly perform the copyrighted composition. But since Respondent did no business in Nebraska, the only chance Petitioner has is to point to the music sold by independent local dealers and claim a basis for regulation because thereof. The trouble with this contention again is that it depends for its validity on the assumption that the public performance rights are in some manner affixed to the sheet music. This being a wrong assumption, Petitioner's whole argument is unsound.

Obviously, as the Circuit Court of Appeals said, Respondent had the right to sell or otherwise dispose of its compositions in this state, or not to do so, as it saw fit. If it did not choose to do so (as in this instance) then it is equally obvious that such election could not make the music available to Petitioner for free commercial use in this state. Therefore, it does not matter whether the Nebraska statute is a valid statute or an invalid statute; and the Circuit Court of Appeals so held.

Furthermore, as the Circuit Court of Appeals went on to say, this statute has been repealed, and there is no reason why this Court should concern itself with the validity or invalidity of a repealed statute.

Petitioner would like to leave the impression that the Nebraska statute is a defense to Respondent's infringement suit because Respondent did not file its musical composition under the provisions of the Nebraska statute. Such is not the case. The applicable section of the Nebraska statute reads as follows:

> "Price; failure to affix; effect. In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit at the time and in the manner specified in this act, *then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition* may use the same for private or public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state." (Sec. 59-1304 Revised Statutes of Nebraska, 1943) (Part of Sec. 2 of original Act.)

The "such person" intended to be protected is one who "purchased and paid for such copyrighted musical composition" but the record affirmatively establishes that no Petitioner had made such purchase. See Record, Peony Park case, page 287, Interstate Hotel Company of Nebraska, page 293, Lloyd G. Fox, page 294. The trial court found as follows:

> "That there is no evidence that any of the defendant proprietors in these cases purchased in Nebraska, or elsewhere, prior to the performances

herein found, each or any of the musical compositions involved in these cases, either in the form of sheet music or orchestrations." (Finding of Fact No. 157, Record, page 73.)

The proprietor of the establishment wherein the musical composition is publicly performed is liable for the performance and, if same constitutes an infringement, is liable to the penalty affixed thereto. (*Herbert v. Shanley,* supra, and *Buck v. Jewell-LaSalle Realty Co.,* supra.)

Petitioners, therefore, wholly fail to qualify themselves as persons entitled to assert a right to protection under the wording of the Nebraska statute, another reason why the validity or invalidity of the Nebraska statute is not involved.

Short Answer to the Third Point

As to the third point, it is undisputed in the record that when this Court held in *Marsh v. Buck,* 313 U. S. 406, 85 L. Ed. 1426, and *Watson v. Buck,* 313 U. S. 387, 85 L. Ed. 1416, that Nebraska (or Florida), had the right to bar price fixing combinations of copyright owners from the state if it wanted to, the American Society of Composers, Authors and Publishers ceased to do business in Nebraska and withdrew from the state.

Petitioner, by referring to ASCAP as "respondent's organization" (Petition, page 8), and by making statements such as "respondents, through their organization then known as the Music Publishers Protective Association (now ASCAP)" (Petition, page 11), and by other

references such as the charge of "monopolistic control" (Petition, page 20), seek to leave the impression that ASCAP and not Respondent is the real party in interest. This is not the fact. The trial court found that, previous to the infringements, ASCAP had assigned the public performance rights to Respondent and, of the resolution assigning such rights, specifically found:

> "* * * that said resolution, including the revesting and relinquishment therein professed, was not a subterfuge or simulation, but, though reluctant and compelled by law, was genuine and real and in good faith, and has consistently been honored by Ascap; that Ascap actually discontinued business in Nebraska promptly after the decision of the Supreme Court in Marsh v. Buck (supra) on May 26, 1941." (Record, page 33.)

The Findings of Fact on this point are in the Record at pages 71 and 72. Petitioner in no way challenged these Findings in the Circuit Court of Appeals and is, therefore, in no position to avoid the consequences of those Findings in his Petition for Writ of Certiorari.

That the Society continues to act as a licensing agent for Respondent in other states where its operations are not illegal is clearly of no concern to the State of Nebraska. And that Respondent continues to use the Society as a licensing agent in other states clearly does not bar this Respondent from enforcing in the Federal Courts of Nebraska, as an individual, his rights under the Copyright Act.

But beyond this, as pointed out by the Circuit Court of Appeals, a defendant who has admittedly been guilty of a wrongful appropriation of plaintiff's property is

in poor position to complain about the cleanliness of the hands of the plaintiff.

Analysis of the Five "Reasons" Advanced for the Writ of Certiorari

Having presented the real issues in this case, we now turn to the so-called "reasons" advanced by Petitioner and attempt to analyse them and answer them for this Court. (We do not consider them in the order set out by Petitioner.)

Petitioner's heading would have been more accurate if it had read "Five (or more) Misstatements Relied Upon to Attract the Attention of the Court." Counsel for Petitioner tries hard to bring the case within some of the reasons for granting certiorari referred to in Rule 38, but fails, as of necessity, he must.

Claim that this Court, and other Federal Courts, have never had the true text of Section 1 before them.

Counsel first would have the Court believe that never since the passage of the present Copyright Act in 1909 has this Court ever had before it the true text of Section 1 of the Act. He does not contend that this Court did not have before it for construction and enforcement, both in the Shanley case and the Jewell-La-Salle case, Section 1 of the Act, and particularly subsection (e) of Section 1 dealing with the right of public performance for profit. His contention presupposes that Mr. Justice Holmes, in the Shanley case, and Mr. Jus-

tice Brandeis, in the Jewell-LaSalle case, both wrote their opinions without reading Section 1(e) in full.

He asserts that, over all the years, the Federal Courts have been upholding the copyright owner's right of public performance for profit notwithstanding printing and vending in the form of sheet music, because they have erroneously been following two cases where the judge got mixed up on punctuation, namely *Hubbell vs. Royal Pastime Amusement Co.*, 242 Fed. 1002, and *M. Witmark & Sons v. Pastime Amusement Co.*, 298 Fed. 470.

He says that in the Hubbell case the trial judge inserted a semicolon after the words "musical composition" in Section 1(e), and that the Witmark case was decided by the court under the impression that there was a period at the same point.

Counsel never shows us how the presence or absence of the semicolon or period would have made the slightest difference so far as the question as to whether or not the exercise of the right to print and publish in the form of sheet music waives the right of public performance for profit is concerned. But he asserts that all of the subsequent cases have followed the Hubbell and Witmark cases and hence, having all been based upon the original misconception or misconceptions of the trial judges in those cases, have all been incorrectly decided.

This assumption is wrong so far as the Hubbell case is concerned for the following reasons:

First, Herbert v. Shanley, 242 U. S. 591, 61 L. Ed. 511, wherein the right of public performance for profit was recognized as a right separate and distinct and in

addition to the right to print and vend, was decided four months prior to the Hubbell case.

Second, The Hubbell case has never been cited by any Federal or State Court from the date of its rendition down to the time that it was referred to in Judge Delehant's decision in the instant case. See *Shepherd's Federal Reporter Citations 1938,* column one, page 1297, and the July 1946 Supplement.

Third, Section 1(e) has never been quoted by the court in any case with a semicolon following the words "musical composition."

Fourth, in *Jewell-LaSalle Realty Co. v. Buck,* 283 U. S. 202, 75 L. Ed. 978, and *Buck v. Jewell-LaSalle Realty Co.,* 283 U. S. 191, 75 L. Ed. 971, where it was specifically held that:

> "The copyright act confers two monopolies—that of making copies and that of giving public performance for profit,"

the Hubbell case was not even mentioned.

Nor has the Witmark case had any misleading effect upon subsequent decisions. The reasons why it has not are as follows:

First, Counsel's statement that the trial court decided the case upon the theory that Section 1(e) ends with the words "Musical composition" is not true. The full text of Section 1(e), in so far as it is material here, appears in the opinion of that court at the end of the first paragraph at the top of page 476 in 298 Federal. There was in the case the question as to whether or not merely playing the chorus of the copyrighted work

constituted an infringement of the right of public performance for profit. Counsel was contending that (a) because the original draft of the Act read:

> "The copyright secured by this act shall include the sale and exclusive right to publicly perform a copyrighted musical work *or any part thereof*,"

and (b) because the italicized words had been dropped, and (c) because the law had finally emerged in its present form as follows (quoting it just as counsel quoted it in his brief):

> "That any person entitled thereto * * * shall have the exclusive right * * * to perform the copyrighted work publicly for profit if it be a musical composition,"

the playing of only the chorus did not constitute an infringement of the work. Obviously, counsel in that case did not need to quote the subsection in full in order to make his point. And obviously this was entirely plain to the court when it said in the opinion that in order to set out plainly and clearly the position of counsel for the defendant it would quote from his brief. There is not the slightest justification for saying, as counsel for Petitioner in this case says, that the court in the Witmark case inserted a period after the words "musical composition," and that all of the courts since that time have failed to read the section as set out in the statutes and have erroneously assumed that in the statute the words "musical composition" are followed by a period, from which assumption they have passed to the assumption that printing and vending does not waive the right of public performance for profit.

Counsel for Petitioner even goes so far as to say, on page 16 of his petition, that the district judge in rendering his opinion

> "stated that he was copying the copyright statute from the defendant's brief, along with other matters."

This is not what the court said, as counsel must know. What the trial court really said was (page 477):

> "In order that this new view of the question may be clearly understood, I shall state it in counsel's own language, which is as follows:"

Then follows, in the quoted language, the abbreviated version of Section 1(e) which counsel for defendant in that case had set out in his brief, and which counsel for Petitioner in this case now reproduces on page 16 of his petition.

There was indeed in that case a question as to whether or not there had been a public performance for profit. The question was decided adversely to the defendant on the authority of Herbert v. Shanley and Church v. Hilliard, and in this connection we may note that the Supreme Court in those cases was not influenced by the Witmark case either since that decision came later.

Therefore the assertion that all subsequent cases where the right of public performance for profit has been enforced have been based upon a misconception of the law originating in the Hubbell and Witmark cases is, we submit, an assertion made for the purpose of catching the eye of this Court, and not in good faith nor in

the belief that the whole course of decision has been influenced by original error in these cases.

As to this contention the Circuit Court of Appeals in the instant case said:

> "We have examined the cases upon which appellants rely for the development of this argument. We think it sufficient to say that we find nothing in them tending to support appellants' contention." (Record, page 323.)

We see no reason why the time of this Court should be taken up in duplicating this examination.

Claim that there is a conflict between Circuits.

The next attempt on the part of counsel to bring himself within the pattern of Rule 38 is the charge that there is a conflict between the decisions of the Second, Fourth and Eighth Circuits. He is not very clear as to what the conflict is. As near as we can make it out his claim is that the lower courts in the Shanley and Hilliard cases held that when a copyright proprietor sells printed copies of his composition to the public the public performance rights go along with the music for the price of the sheet music itself, and that this is in conflict with the decision of the Eighth Circuit in this case and the Fourth Circuit in the Witmark case. That neither of these decisions so held was demonstrated by the Circuit Court of Appeals opinion in the instant case (Record, bottom page 321), but if they did so hold the holding was reversed when the cases got to this Court since, as pointed out by both Judge Riddick and Judge

Delehant, there would have been no occasion to pass upon the question of whether the performance was for profit in the Shanley and Hilliard cases if the public performing rights had gone to the defendant along with his purchase of the sheet music. So there is no conflict between the Eighth Circuit and the Second Circuit, because the Supreme Court of the United States itself has already held that the construction placed upon the Act by the Eighth Circuit is correct.

And there is no conflict between the Second Circuit and the Fourth Circuit. The Witmark case followed the Supreme Court decision in the alleged conflicting cases that went up from the Second Circuit. So there aren't any conflicts between the Circuits to be resolved in this case. This is just another device produced in the hope that in a hurried reading of the petition and supporting brief the Supreme Court will grant certiorari without examining the decisions.

Claim that the question as to whether publication and sale frees public performance rights has never been settled by this Court.

Petitioner invites the consideration of this case by this Court on the theory that the question as to whether or not printing and selling over the counter constitutes an abandonment of public performance rights has never had the attention of this Court.

In *Church v. Hilliard* it was stated at page 322 of the decision of the Circuit Court of Appeals, 221 Fed. 229, that:

> "When the copyright proprietor of a musical composition sells printed copies of it to the public, the performing right goes with them."

Is it to be supposed that Mr. Justice Holmes overlooked that statement by the Circuit Court of Appeals when he wrote the decision of this Court on appeal?

Similarly it appears from the opinion of the Circuit Court of Appeals in the Shanley case, at page 342 (229 Fed. 340), that it was the contention of the defendant that by virtue of its purchase of a song published and sold by the plaintiff the defendant was authorized to perform it in a restaurant. If the selling of sheet music constitutes an abandonment of public performance rights, then it was immaterial in that case whether the performance was for profit or not. Is it to be supposed that Mr. Justice Holmes overlooked this point when he decided that the performance in question was in fact a public performance for profit and therefore in violation of Section 1(e)?

And is it to be supposed that this Court completely overlooked the question a second time in the Jewell-LaSalle case when Mr. Justice Brandeis made it so clear that the right to print and vend is one thing, and the right to perform publicly for profit is another, that the two rights exist simultaneously, and that each or both may be exercised as the best interests of the copyright owner dictated?

Has counsel brought to the attention of this Court anything at all that would incline this Court to believe that Congress may have intended that the copyright

owner could have either of the two rights, but not both? Counsel boldly asserts that such is the case. And he invites this Court to examine the appendix of his brief in the Circuit Court of Appeals where he says there will be found Congressional Report No. 2222, submitting the Act of March 4, 1909, and a description of the copyright laws passed by Congress from 1793 to date, prepared by counsel for Petitioner. But never anywhere in his brief does he point to any language, either in the Committee Report or in any previous Copyright Acts, which would in the slightest degree lead to the conclusion that both of these rights could not exist simultaneously. Nor does he have anything to say about that part of this same Section 1(e) where records are freed from royalty except with respect to performance rights. ("The payment of the royalty provided by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright *except in case of public performance for profit.*") Nor does he ever refer to the damage section (Section 25), where performing rights are expressly protected against infringement.

He invites attention to his digest of prior copyright laws set out in the appendix of his Circuit Court brief, but does not tell this Court what it may expect to find by such an examination. This is simply a device to lead the Court to believe that there is something in the prior copyright acts that would warrant an inference that public performance rights did not exist as a thing separate and apart from the other rights pertaining to the copyright prior to the enactment of the 1909 statute.

Such an examination would not show anything of the sort. Originally the copyright statutes protected an author with respect to copying or publication of his work. The works protected were also limited. Over the years there was an enlargement in the kinds of work protected and there was an enlargement in the rights protected. For example, the Act of 1856 for the first time provided that the author of a dramatic work should not only have the right to multiply it in copies for sale but the sole right to perform the same. (See "The Statutes at Large and Treaties of the United States of America, from Dec. 3, 1855 to March 3, 1859, edited by George Minot and George P. Sanger" Vol. II Boston 1859, pp. 138-139.)

It was in 1897, not 1909, that Congress for the first time gave the copyright owner the exclusive right of public performance of his musical composition. The first two sentences of the Act read as follows:

> "Sec. 4966. Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic, or musical composition, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court shall appear to be just. If the unlawful performance and representation be wilful and for profit, such person or persons shall be guilty of a misdemeanor and upon conviction be imprisoned for a period not exceeding one year."

This right was stronger than the right of public performance *for profit* as the proprietor's right was violated by a performance anywhere in public, no matter what the circumstances, and whether or not a profit ensued.

The 1909 Act was both a new copyright act and a consolidation of all previous copyright acts. (See *Witmark v. Standard,* 221 Fed. 376.) It very clearly gives to the copyright owner the exclusive right to perform his musical compositions publicly for profit. It, of course, also gives him the right to print, publish and vend it in the form of sheet music or orchestration.

Counsel does not have the temerity to assert flatly that the right of public performance for profit, as a thing separate and apart from the right to sell in the form of sheet music and capable of being exercised simultaneously with the latter right, did not exist under prior acts, but he would lead the Court to believe that an examination of prior acts would show that this right of public performance for profit was something unknown prior to 1909.

On page 25 of his petition, and elsewhere therein, counsel gives the impression that the Copyright Act was passed for the benefit of those who use music commercially, such as his dance hall, hotel and skating rink clients. Congress never had any such intention. Congress wanted to preserve the exclusive monopoly to the creator of the music. That has been its policy throughout and the reason for it is that the preservation of the monopoly encourages the creator and eventually benefits the public at large. This was discussed at an early date in *Grant*

v. Raymond, 6 Pet. 218, 8 L. Ed. 376, where this Court said that the grant of a copyright or patent is a contract under which the government says, in effect, to the author or inventor "if you will disclose your writing or discovery to the public I shall give you, for a limited time, the exclusive right to exploit it for profit; upon the expiration of the limited period, however, the work shall belong to the public forever."

The play on "All rights reserved, including public performance for profit."

Counsel's next effort to intrigue the court is the presentation of the idea that the decision of the Circuit Court of Appeals is based, in part at least, upon the erroneous presumption that the presence of the words "All Rights Reserved, Including Public Performance for Profit," on the sheet music, enlarged the rights conferred by the Copyright Act. The Circuit Court of Appeals made no reference whatsoever to this subject in its opinion, notwithstanding Petitioner's statement that:

> "Certiorari should be allowed because the trial court found, *and the Circuit Court of Appeals affirmed,* the proposition advanced by respondents that certain wording placed on the reproduced copies for sale gave notice to the purchaser that the public performance rights were reserved." (Pet. for cert. p. 26.)

Unquestionably this legend did convey that information, but the Circuit Court of Appeals didn't find it necessary to base its decision either in whole or in part upon that proposition. However, counsel pretends that the question is in the case and this gives him an opportunity to

talk about decisions like *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, and *Bobbs-Merrill Publishing Co. v. Straus*, 210 U. S. 339. But this line of cases was distinguished in *Buck v. Jewell-LaSalle*, 283 U. S. 191, 75 L. Ed. 971, 975, where the court said:

> "The argument here urged, however, is that since the transmitting of a musical composition by a commercial broadcasting station is a public performance for profit, control of the initial radio rendition exhausts the monopolies conferred—both that of making copies (including records) and that of giving public performance for profit including mechanical performances from a record); and that a monopoly of the reception for commercial purposes, of this same rendition is not warranted by the act. The analogy is invoked of the rule under which an author who permits copies of his writings to be made cannot, by virtue of his copyright, prevent or restrict the transfer of such copies. Compare Bobbs-Merrill Co. v. Straus, 210 U. S. 330, 52 L. Ed. 1086, 28 S. Ct. 722. This analogy is inapplicable. It is true that control of the sale of copies is not permitted by the act, but a monopoly is expressly granted of all public performance for profit."

Other attempts to rely upon this same theory in musical copyright cases have met with no success. See *Irving Berlin, Inc. v. Russo, et al* (5th C. C. A.), 31 F. (2) 832, and *Famous Music Corporation v. Melz* (D. C. Western Dist. La. 1939), 28 F. Supp. 767.

In *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, 61 L. Ed. 866, there was a similar dissimilarity in that there the effort was to control the price at which the patented machine might be sold after the manufacturer had been paid therefor, by attaching to the machine

a notice to the effect that it might not be delivered to any member of the public until "the full license price" stated in the notice had been paid. The court said that this was just a device to control the price of the patented machine on resale after it had passed into the hands of the dealer. Cases of this character obviously have no application.

Effort to have court review question as to whether respondents engaged in business in Nebraska.

Departing from the pattern of Rule 38 counsel would have this court review the question of whether or not respondents engaged in business in Nebraska. Counsel did not ask for a review of this question in the Circuit Court of appeals (Record p. 95 et seq.) and is not in position to do so here.

The trial court found (Record page 72, Finding 152):

> "That no corporate plaintiff is incorporated (fol. 118) or has, at any material time, done or transacted any business in Nebraska, or sold in or into Nebraska, either directly or indirectly, by domestic sale, or otherwise than through the channels of interstate commerce, any published sheet music or orchestral arrangements."

The Trial Court also found (Record page 72, Finding 153):

> "That, at all material times, music dealers in Nebraska have purchased and received through the channels of interstate commerce from the several plaintiffs, either immediately or through their selling agent or agents, published sheet music and orchestral arrangements of their respective copyright-

> ed musical compositions, obviously for the purpose of resale by such dealers in Nebraska, but on their own account to their local trade; * * * ."

No error was assigned with reference to any of these Findings on appeal. Counsel is in no position to ask this court to review the question now. There is a presumption that the Findings of the trial court are correct. This court is certainly not going to grant certiorari for the purpose of reviewing the question of whether or not respondents engaged in business in Nebraska where the trial court found that they did not and petitioner did not even contest the point on appeal. (See Record page 95 and appellant's brief.) As a matter of fact, petitioner claims in this very application that respondents boycotted Nebraska on all commercially usable music (Petition page 8).

Attempt to inject a monopoly issue into the case.

At the bottom of page 19 of his petition counsel asks for the consideration of this case by this court:

> "to the end that this vast control now exercised by the respondents may be declared as unlawful."

Counsel points to no place in the record to the effect that these four Respondents have any "vast control" over anything. In other places in his petition and brief he talks as though these particular Respondents have and had a monopoly on the performing rights of all copyrighted music. At the top of page 25 of his petition he himself says that there are 369 music publishers in the country. We have here four, and only four, individual copyright owners who are simply suing under

the Copyright Act to prevent these Petitioners from pirating the music individually owned by them. The trial court found and stated:

> "That no combination, such as is described in Section 59-1302, Revised Statutes of Nebraska 1943, is involved in these cases, and each case is conducted by the plaintiff, individual copyright proprietor, in its own name and behalf and solely for its own benefit." (Record, page 71, Finding 147.)

This Finding was not contested by Petitioners in their appeal to the United States Circuit Court of Appeals (Record, page 95), and the effort to inject a monopoly issue here is obviously made for the purpose of creating the impression that the suppression of a monopoly is here involved which should have the attention of this court.

To this same end counsel represents to the court, at page 20 of his petition, that the Respondents in this case in and of themselves constitute a group of publishing houses that exercise a monopolistic control. Judge Delehant disposed of this contention adversely to the Petitioners (see Record, pages 35, 36). See also Finding No. 147, Record page 71, to the effect:

> "That no combination, such as is described in Section 59-1302, Revised Statutes of Nebraska 1943, is involved in these cases, and each case is conducted by the plaintiff, individual copyright proprietor, in its own name and behalf and solely for its own benefit."

See also Conclusion of Law XLV, Record, page 79, 80, as follows:

> "That each of said plaintiffs has a large number of copyrighted musical compositions in its own-

> ership and under its control does not operate to bring the plaintiffs, or any of them within the definition and contention of Section 59-1302 Revised Statutes of Nebraska 1943."

As indicated above, this Finding was not assigned as a point relied upon for reversal.

Effort to convince the Court that "protection" of music users is here involved.

Counsel seeks to convince this court that this is a case for certiorari by stating that:

> "The protection that the music users of America have under the National Copyright Act would be destroyed, and by court decision no state law could effectively be passed to protect its citizens, if the Eighth Circuit Court's opinion is allowed to stand." (Petition, page 25.)

Counsel cites neither evidence nor decisions to support this statement. Presumably the "protection" that he refers to is such "protection," under his theory, as would permit music users to perform gratis copyrighted music publicly for profit if the copyright owner undertook to sell his composition in sheet music form. Presumably a state law which counsel would consider effective to protect its citizens would be a law requiring copyright owners, in order to protect their public performance rights within the state, to do something more than is required of them by the National Copyright Act, on penalty of loss of those performance rights through failure to comply with the state statute.

At page 25 of his petition counsel, still trying to say something that will make the court think that such

unusual circumstances exist as would justify the issuance of the writ, says that:

> "An unlimited and uncontrolled price must be paid to respondents by all who must have music renditions commercially on their premises, or go out of business."

Since, on counsel's own statement, there are some 365 other music publishers it is quite probable that music users will be able to get along even though the four copyright owners here involved in these cases might insist on license fees which the Petitioners and other music users could not profitably pay. There is no evidence whatsoever that these Respondents have ever exacted or sought to exact any such price.

Conclusion

Having examined all of the reasons asserted by Petitioner as to why certiorari should be granted in this case, we find that none of them come within the pattern of Rule 38, and that none of them presents any unusual or extraordinary question of law or fact that should have the attention of this court. We find that we have here involved only that kind of case which any copyright owner must bring where some commercial user of music attempts to perform publicly for profit and without license or permit the work of the copyright owner. Each Petitioner admits that he performed the music commercially without license or permit from the copyright owner, but asserts that he had a right to the free use of the music because the copyright owner had not complied with certain provisions of the Nebraska statute.

The Circuit Court of Appeals found that since Respondents had not undertaken to engage in business in Nebraska the fact that they had not elected to subject themselves to the regulations of the Nebraska statute did not justify Nebraska music users in pirating their music. In this state of the record there is nothing for this court to consider, and obviously, it does not matter whether the Nebraska statute was valid or invalid. And certainly this court should not be asked to consider the question as to whether this statute would have been effective had the Respondents elected to come within the state, a question which is now, in view of the repeal of the statute, moot.

Misstatements Relied Upon By Counsel to Capture the Interest of the Court.

We feel that this petition for issuance of writ of certiorari is not a good faith application. The reason we think so is that counsel has found it necessary or expedient to make so many misstatements. He has erroneously told this court:

1. That the correct text of Section 1(e) of the Copyright Act of 1909 has never been examined by this Court;

2. That the erroneous insertion of a semicolon in the text of the Act by the trial judge in the Hubbell case, and a period by the trial judge in the Witmark case, has changed the whole course of decision;

3. That his claim that the exercise of the right to print and vend waives the right of public performance for profit has never heretofore been considered in any court;

4. That there is a conflict between the Second, Fourth and Eighth Circuits as to how Section 1(e) should be interpreted;

5. That the Copyright Act contains language to the effect that publication in sheet music form waives the right of public performance for profit;

6. That the Committee Report at the time the 1909 Act was passed shows that Congress intended that such should be the case;

7. That both the trial court and the Circuit Court of Appeals enlarged the rights granted by Section 1 by resorting to the printed statement:

> "All Rights Reserved, Including Public Performance for Profit";

8. That there is a line of Federal authorities condemning reservations of this sort;

9. That Section 41 of the Copyright Act:

> "was cited by the trial court and affirmed by the Circuit Court in the cases at bar as a statute conferring the right to withhold or restrict the use or price of the copyrighted material after sale,"

when, as a matter of fact, the right to withhold or restrict the use or price of copyrighted material after sale is not involved in this case, and neither the district court nor the Circuit Court of Appeals referred to Section 41 (Petition, page 28).

10. That this court, in *Marsh v. Buck,* 313 U. S. 406, and *Watson v. Buck,* 313 U. S. 387, declared valid the entire Nebraska Act, when, as counsel well knows, the Circuit Court of Appeals found it unnecessary to inquire into the validity of the Nebraska Act, and when, as counsel also well knows, the futility of such a claim was thoroughly demonstrated both by the trial judge (Record page 38), and the author of the Circuit Court of Appeals opinion (Record, bottom page 325).

11. That the decision of the trial court

> "opened the way for an avalanche of additional infringement suits against Nebraska users including petitioners which would have been confiscatory of their respective businesses. Accordingly the state legislature repealed the act."

wher counsel well knows that there has not been one single infringement suit in this jurisdiction since Judge Delehant's decision, and when counsel, in the nature of things, cannot know what moved the State Legislature to repeal the Act;

12. That counsel had no opportunity to explain to the Circuit Court of Appeals that error had been committed in stating that:

> "A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law."

when such "opportunity" existed in the form of a motion for rehearing and no such motion was filed;

13. That:

> "It will be seen that the law now reads in accordance with the decision above quoted: '(e) To

> perform the copyrighted work publicly for profit if it be a musical composition;'" (Petition, page 15.)

when neither in the Statutes at Large, nor in U. S. C. A., nor in any decision, has Section 1(e) ever been printed and published with a semicolon following the word "composition";

14. That the trial judge in Witmark & Sons v. Pastime Amusement Company:

> "In rendering his opinion, stated that he was copying the copyright statute from the defendant's brief, along with other matters. The judge said he so copied in order that there could be no doubt about the language." (Petition, page 16.)

when the actual language of the judge was:

> "In order that this new view of the question may be clearly understood (that the dropping out of the words "or any part thereof" indicated an intention that the chorus could be played with impunity), I shall state it in counsel's own language which is as follows:" (298 Fed. 470, 477.)

15. That the Eighth Circuit in the instant case "copied for the first time in the history of the copyright litigation on this subject the exact wording of the Statute, but the court supported its opinion with the South Carolina decision" (Witmark & Sons v. Pastime Amusement Co.), (Petitioner, page 19), when the exact wording of the statute was in fact set out in this very Witmark case, and when the decision of the Eighth Circuit in this case was based, not upon the holding in the Witmark case, but upon the holding of this court in the Jewell-LaSalle case, the Shanley case, and *Fox Film Corporation v. Royal*, 286 U. S. 123, 127.

Each and every one of the above statements is untrue. A petition based upon misrepresentations of the record and the state of the law can hardly merit the consideration of this court. It is not probable that a salesman who seeks entrance to the premises through misrepresentation will have anything of merit to sell once he has been admitted.

Respectfully submitted,

JAMES J. FITZGERALD, JR.,

FITZGERALD & SMITH,
810 Insurance Building

YALE C. HOLLAND,

KENNEDY, HOLLAND, DELACY & SVOBODA,
1502 City National Bank Building,
Omaha 2, Nebraska

Attorneys for Respondents.

The undersigned attorney for Petitioners in the above entitled cases does hereby acknowledge receipt of copy of the above and foregoing Brief in Opposition to the Petition for a Writ of Certiorari herein, said service having been made upon the undersigned at Omaha, Nebraska, this _____ day of December, 1946.

_____